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May 26, 1998

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, D.C. 20554

Re: MM Docket No. 87-268

Dear Ms. Salas

Transmitted herewith, on behalf of Channel 3 of Corpus Christi, Inc., the licensee of Television Station KIII, Corpus Christi, TX, are an original and four copies of its Opposition to the Petition for Reconsideration of Davis Television Corpus Christi, LLC in the above-referenced proceeding.

Any questions concerning this matter should be addressed to undersigned counsel.

Very truly yours



Stanley S. Neustadt

Encl.

cc: Dennis P. Corbett, Esq.

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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE

Federal Communications Commission

In the Matter of

Advanced Television Systems
and Their Impact upon the
Existing Television Broadcast
Service

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MM Docket No. 87-268

To: The Commission

OPPOSITION OF CHANNEL 3 OF CORPUS CHRISTI, INC. TO PETITION FOR RECONSIDERATION OF DAVIS TELEVISION CORPUS CHRISTI, LLC

Channel 3 of Corpus Christi, Inc. ("Channel 3", the licensee of Television Station KIII, Corpus Christi, TX, by its attorneys, pursuant to Section 1.429(f) of the Commission's Rules, hereby opposes the Petition for Reconsideration filed in the above-captioned proceeding on April 20, 1998, by Davis Television Corpus Christi, LLC ("Davis") which urges the allotment of NTSC channel 56 instead of NTSC channel 38 at Corpus Christi, TX, and changes in the NTSC allotments in other cities in which it has applied for an NTSC authorization. This proceeding is patently not appropriate for consideration of new or changed NTSC channel allocations, especially changes in allocations for channels on which the current "freeze" has been in place for over ten years. Davis has advanced no reasons which would justify the very special treatment it requests. In support of its position, Channel 3 states:

1. Channel 3's station KIII is licensed to operate at Corpus Christi, TX on NTSC channel 3. Davis, on September 20, 1996, filed an application for a construction permit for

a television station to operate on channel 38 at Corpus Christi. Because the Commission, by Order in RM-5811 released July 17, 1987, imposed a "freeze" on requests to amend the TV Table of Allotments and on applications for television construction permits for vacant television allotments within the minimum co-channel separation distance from specified cities, which included Davis' application, Davis requested a waiver of that freeze. That request has not been acted on. The interest of Channel 3 in the grant of new competitive facilities in its city of license is clear.

2. Davis now requests that the allotment of NTSC channel 38 to Corpus Christi be changed to NTSC channel 56.^{1/} This request has two very serious infirmities. First, this rule making proceeding, which should now be in its very last stages, has not heretofore considered amendments to the NTSC Table of Allotments^{2/}. The Davis request is extremely improper; the only appropriate method for achieving an amendment to the NTSC channel in any community, as set forth in Sections 1.401 and 1.420 of the Commission's Rules, requires a petition for rule making, at least in circumstances such as those present here. Not only is the caption of this proceeding--Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service--limited to the DTV service, but at no time did the Commission suggest expressly or by implication that in this proceeding it would consider changes in the NTSC allotments.

3. The second infirmity of the Davis request is that it ignores the very purpose of the freeze of 1987. That freeze was expressly intended to maintain the NTSC status quo in order that its DTV determinations would not have a shifting base. For the Commission to lift or modify

^{1/} Davis has previously filed a Petition for Partial Reconsideration in this proceeding in which it requested that DTV channels be assigned to applicants for NTSC channels and that they be permitted to construct and operate such DTV channels even if they do not activate the NTSC channel.

^{2/} NTSC channels were only considered to the extent that vacant reserved NTSC channels were to be reallocated to DTV.

its freeze in this very last stage of this proceeding, would be recklessly irresponsible and would open a Pandora's box, which might delay the transition to DTV for an indefinite period. Individual grievances such as those alleged by Davis must be determined in a separate forum, particularly since Davis has no standing as a permittee or licensee whose television authorization has been changed in this proceeding.

4. Although the required notice of the purpose of rule making and its possible result, under the Administrative Procedure Act, may consist of comments filed in the proceeding by interested parties, that can only occur if those comments propose a logical outgrowth of the Commission's proposed rule. See *National Black Media Coalition v. F.C.C.*, 791 F. 2d 1016 (2nd Cir., 1986), at 1022-1023, and cases cited therein; see *Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, 846 F. 2d. 1449, 1455 (D.C. Cir., 1988). In the instant proceeding, the comments of Davis would require an expansion of this proceeding far beyond anything the Commission contemplated or gave notice of.

5. In making its second argument, that the enactment of the new Section 309(l) of the Communications Act somehow requires that the Commission act on pending applications which were filed before July 1, 1997, including its own application, Davis has indulged in poetic license taken directly from Tales of Hoffman. A statute which requires that all qualified competing broadcast applications be decided by auction, rather than by lottery or comparative hearing, except for those filed before July 1, 1997, is asserted to require that all applications filed before that date be decided. On its face, and indeed, in any other way, that section can be read only as requiring that applications filed after that date must be decided by auction and that applications filed before that date may be decided by lottery. The section cannot reasonably be understood as mandating that all applications filed before that date be granted--the statute deals only with the procedures to be used

to settle conflicts between mutually exclusive applications. Even Davis does not argue that all applications filed before that date must be acted on--only that those filed subsequently must be subject to auction. If and when "frozen" applications filed before that date are acted on, they may be settled or subject to a lottery, but the Congress surely did not intend to interfere with the Commission's decisions about the transition to DTV.

6. There is no reason, and surely Davis has advanced none, why the Commission's painstaking approach to the transition to DTV should be derailed in order to consider in this proceeding changes to the NTSC allotment table which might be helpful to an individual NTSC applicant (which Davis will not be until the freeze is lifted) or even, indeed, to the overall television allocations. Davis will have an opportunity to argue its case for a revision of the NTSC allotments any time it wishes to file a petition for rule making, or after the freeze is lifted. It has not advanced a cogent argument for lifting the freeze or addressing the NTSC allotments in this proceeding. Its Petition should be denied.

Respectfully submitted

CHANNEL 3 OF CORPUS CHRISTI, INC

By Stanley S. Neustadt
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May 26, 1998

Its Attorneys

CERTIFICATE OF SERVICE

I, Brenda Chapman, do hereby certify that a true and correct copy of the foregoing OPPOSITION OF CHANNEL 3 OF CORPUS CHRISTI, INC. TO PETITION FOR RECONSIDERATION OF DAVIS TELEVISION CORPUS CHRISTI, LLC was mailed first-class, postage prepaid, this 26th day of May, 1998 to the following:

Dennis P. Corbett, Esq.
Leventhal, Senter & Lerman P.L.L.C.
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Washington, D.C. 20006-1809



Brenda Chapman